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Wednesday, March 26, 2008

How our frog was boiled

Libertarians have long observed with regret the radical expansion of the power of the United States federal government over its original scope under the Constitution of 1789. Lovers of freedom tend to blame two chief culprits for this expansion: President Abraham Lincoln, who instigated our Civil War, and President Franklin Delano Roosevelt with his New Deal. And indeed, these Presidents did instigate some noxious precedents: Abraham Lincoln the draft and income tax, FDR the advocacy of positive substantive rights and the birth of practically unlimited regulatory power of federal government. Some cite villains from the Progressive Era, such as Theodore Roosevelt and Woodrow Wilson.

However, these theories oversimplify U.S. history to the point where the real and fixable sources of our loss of freedom cannot be identified. They make it sound like if we could simply go back in history and remove a handful of powerful villains, or avoid a handful of crises, then we would be living in a much freer society today. That is very far from the reality.

The consequences of even Lincoln and FDR were not unmixed. Lincoln damaged some freedoms, but he also greatly increased freedom by ending slavery. The Civil War Amendments, especially the 14th Amendment, eventually led to a great increase in the enforcement of unenumerated rights (hence the name of this blog!) and the Bill of Rights against the states (and, for reasons I relate here, hence also against the federal government). Among the leading countries in the middle of the evil 20th century, the United States despite FDR was the most free. FDR destroyed the threat of fascism and appointed most of the Justices who ended forced and unequal segregation by race. One can easily argue, especially in the case of FDR, that the curses outweighed the blessings, but one cannot seriously portray even these powerful Presidents as unmixed enemies of freedom. It's great fun, and may be morally imperative, to blaspheme these great gods in the pantheon of government worship, but criticisms of these particular actors don't get us to the core of why, in the face of a Constitution that outline a strictly enumerated set of powers, the adherents of that religion were able burst far beyond those bounds and render them nugatory.

The expansion of power of the U.S. federal government was not primarily due to villians, crises, or revolutions, but far more resembled the proverbial boiling frog: it mostly happened by small and obscure steps that were not widely noted by lovers of freedom at the time, and have seldom been noted by us since. The slow rot of Constitutional protections against federal power stemmed from subtle but endemic flaws in the original frame of our federal government, the rise of an economy where large numbers of people earned income from auditable corporations (making the income tax, the most lucrative tax in history, practical), and the disappearance of frontiers of free land to which the overtaxed or overregulated could flee. This article focuses primarily on the first, the clearest and most fixable cause, the procedural flaws in our Constitution.

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Nick Szabo

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The U.S. Constitution lists a number of enumerated powers, beyond which Congress was granted no power to legislate. In other words, the U.S. Congress was supposed to have a small, close-ended list of powers, and this is still recognized by the Supreme Court as theoretically true today. If this had remained true in practice, as well as legal theory, the U.S. federal government would be a radically libertarian entity today. That it is no longer practically true, is, more than any other factor, due to the long series of usurpations of power by Congress under the Commerce Clause, which in its words gives the Congress the power to regulate "commerce among the States." At the time, this power was thought to be limited to power to regulate the transport of goods and persons across State boundaries, and indeed in the first century of the Constitution it was largely in practical fact so limited. (There are a number of other causes, such as the 16th Amendment of 1913 legalizing the income tax, but the Commerce Clause is the way in which Congress has most expanded its power to regulated, and an extremely vast expansion it has been).

It's fairly obvious why Congress, by itself, has not and would not seriously let any kind of Constitutional text limit its own power. Less obvious is why the Supreme Court, which has the final word on interpreting Congressional power to legislate under the Constitution, would allow Congress to so greatly expand its powers. But that is just what it did, by many slow and incremental steps.

Under Chief Justice Marshall, there were a number of cases restricting the power of States to regulate what Marshall argued was interstate commerce, and thus under federal jurisdiction. In immediate effect these were libertarian decisions, since they overturned often burdensome State laws. The Marshall Court, and the Story Court that followed it, refused to find, even once, any limits on the federal Commerce Clause power. Although it was generally agreed that "commerce among the States" was limited to the transport of goods and persons across state lines, Marshall refused to define it in this manner, or indeed define any clear outer limited to the Commerce power. Indeed, in dicta (sentences in a legal opinion that are not legally binding, because they are not logically necessary for reaching the verdict), Marshall suggested that any activity that "effects" such transport might be regulated. Although Marshall's nationalist ideology set the tone, overturning state laws and ignoring federal laws, this pattern of limiting state usurpations but ignoring federal usurpations was largely continued by future courts, for reasons of bias or conflicts of interest caused by court selection and structure which I describe here.

Although there were a handful of cases limiting the Commerce Clause in very narrow and specific ways at the end of the 19th century, the *Swift v. U.S.* case in 1905 greatly expanded the Clause's scope to cover manufacturing, not just the transport of goods or persons across State borders, on the theory that the manufactured goods would end up in interstate commerce. This was part of the so-called "Progressive" movement, the rise of the modern religion of "the government", an omnipotent deity called upon by the national press to solve any major problem deemed to be national in scope. This era saw the greatest expansions of federal power in U.S. history, including its basic tools of financial power, the Federal Reserve system and the 16th Amendment in 1913 legalizing the income tax. During this era, in which states also greatly expanded their powers, the Supreme Court was again far more active at limiting the states than limiting federal power. The "Progressive Era" was a very broad and general ideological movement, and most of it cannot be pinned on any particular politician. Drivers of the movement included the steam press and news wire agencies, which promulgated a national view (that vague godlike phrase, "the government", came to refer to the federal rather than state government during this era). Under this new media system information transfer became dominated by the press releases of powerful governments and corporations. The spread of government-mandated education, again inculcating a very nationalist view, in the latter half of the 19th century also played a large role. The end of free arable land on the Western frontier and the rise of the auditable corporation also played crucial roles in facilitating much greater levels of taxation. During this era, except for a handful of minor victories, the federal courts did not prevent Congress and the President under the impetus of this movement from usurping vast powers not granted them under the original meaning of the Constitution.

After this, the New Deal simply delivered the *coup de grace*. In *Wickard v. Fillburn*, the Court proved it had no desire to limit the federal government in any serious way, using Marshall's "effects" dicta to justify its holding that growing wheat on your own small farm for your own consumption is "commerce among the States." Quite recently, the Supreme Court reconfirmed this absurdity: growing marijuana in your house is also "commerce among the States." And thus the frog has been boiled. To this day our amphibian does not realize that it has already been cooked. The idea that the U.S. Supreme Court, given this long history of precedents, and the

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same kinds of selectional and operational biases it has always operated under, will ever seriously limit federal power again, just because that is what the Constitution says it must do, is far-fetched. Our courts as currently structured will only protect certain narrow rights of persons under the Bill of Rights from otherwise omnipotent governments. The idea that "We the People" will somehow elect a Congress or President that will voluntarily waive their own powers is even more absurd. Libertarians are playing a game with a very stacked deck, and that deck is stacked by the Constitution itself, the very same Constitution that in its original meaning was, substantively, radically libertarian, but that included procedural incentives for Congress and the Courts to slowly aggrandize federal powers.

Posted by Nick Szabo at 4:04 PM

Labels: Commerce Clause, Constitution, federal, libertarian, United States

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2 comments:

Jay Dugger said...

Well put. What next with the boiled frog? What can we do, and how might we do it?

7:39 AM

nick said...

What next with the boiled frog?

The boiled frog is dead. However, parts of it would make a good meal for the next political system to come along. Here are some lights at the end of the tunnel:

(1) The Internet is trumping the traditional one-way megaphone press, and the associated growing consciousness of just how narrow and biased the traditional mass media has been towards government power. But for this we must be patient. The Ron Paul movement was a sneak preview that Internet culture is very different from traditional media culture. But it will probably take a generation or more for the ramifications of this to work out, so riding this wave requires patience.

(2) Almost every year a new government is formed somewhere, and these days that usually means writing a new constitution. They need good advice, and libertarians should be there to provide solid, practical advice, not just complaints and theories.

(3) Reduce our dependence on governments through things like smart contracts.

Also, here's an answer I wrote a few months ago: ways to make a political difference.

1:02 PM

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